

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

77-1176

To be Argued by
MICHAEL ROSEN

UNITED STATES COURT OF APPEALS

FOR THE

SECOND CIRCUIT

UNITED STATES OF AMERICA,

Appellee,

- against -

DAVID WALKER,

Appellant.

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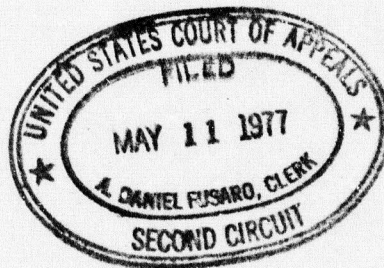
APPELLANT'S BRIEF

On Appeal From the United States District Court
for the Eastern District of New York

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ISSUES PRESENTED

1. Whether the intentional withholding of clearly exculpatory material by the government from the defense resulted in a deprivation of due process.

2. Whether the Court erred in refusing to consider statements of eleven jurors which support the appellant's claim of materiality of the withheld Brady material.

3. Whether the appellant's right of confrontation and the search for the truth were impeded by the government's suppression of relevant Jenck's Act material of its witness, Postal Inspector Edmund H. Mullins.

4. Whether the Court erred in permitting direct proof of appellant's expenditures after the alleged theft when there was no proof as to what was contained in the parcels.

5. Whether evidence of appellant's expenditures under the circumstances herein improperly shifted the burden of proof to the appellant.

6. Whether Anthony Short's testimony was offered solely to prove criminal character or propensity on the part of the appellant.

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PRELIMINARY STATEMENT

This is an appeal from a judgment of conviction entered in the United States District Court for the Eastern District of New York after a three day trial before the Honorable Jack B. Weinstein and a jury. Appellant was convicted of violations of Title 18 U.S.C. §§1709 and 371. He was sentenced to three years imprisonment on each count, to run concurrently and fined \$12,000. He remains free on bail pending this appeal.

STATEMENT OF FACTS

On September 22, 1975 the appellant, David Walker ("Walker"), Helen Helton ("Helton") and Rosario Marchione (Marchione) were employees of the United States Postal Service assigned to Building 179 of the Airport Mail Facility, John F. Kennedy International Airport. They worked the 12 a.m. to 8 a.m. shift.

Walker and Helton were at that time romantically involved. Walker, who had been employed by the Postal Service for approximately 17 years, held the position of foreman of the Foreign Section, but on September 22 was reassigned to the Registry Section to cover a co-worker who was on leave that morning (Tr. 123*).

Helton was assigned to the Registry Section which was enclosed by a floor to ceiling fence. Within the Registry

* References denoted "Tr." refer to Trial Transcript. References denoted "A" refer to Appellant's Appendix.

Section was a valuable cage to which Helton went to retrieve incoming registered parcels that she was to assemble and place in sacks to be ultimately dispatched to the addressees. When a sack was filled she placed a "rotary lock"* on the sack to secure it (Tr. 120-121).

Helton testified that Walker had previously spoken to her about removing a mail sack from the Registry Section (Tr. 124-125).

According to Helton some time after 5:00 a.m. on September 22, 1975, Walker asked her if she had "heart." She testified that she took this to mean whether she was prepared to steal a bag of mail (Tr. 135). She said she then placed twelve parcels of registered mail into a sack, placed a padlock type lock on the sack (rather than the conventional rotary lock), placed the completed sack at her feet, nodded to Walker and turned her back on the sack. That was the last time she saw the sack (Tr. 142). She did not see Walker remove the sack (Tr. 142; 237), nor did she know what was in the parcels.

Marchione testified that between 4:00 - 5:00 a.m. that morning he was in the "swingroom" (lunchroom) one floor above the work floor (Tr. 313). Walker approached him and asked, "Do you have balls?" (Tr. 316). Marchione testified that he answered in the affirmative and then Walker said that a bag "came in on tour 3" - the shift prior to Marchione's shift **

* A rotary lock was described as a lock that registered its openings and closings in consecutive numerals.

** Marchione's shift was from 12 midnight to 8 a.m.

- and that Marchione was to go "downstairs" (Tr. 316). Marchione went directly downstairs and Walker walked back to the swingroom. Marchione went to the foreign dispatch section, where he was regularly assigned, and busied himself with his normal duties (Tr. 318). He then "turned around" and saw Walker emerging with two dollies ("skids") containing mail sacks from the Registry Section and went over to assist him (Tr. 318-319). Marchione helped Walker load the sacks onto a postal truck. Marchione could not testify as to the contents of any sacks. Walker and Marchione had not had previously discussed the theft of any mail.

Helton testified that the next morning she received a large amount of cash from Walker. Similarly Marchione testified that on the following day he received \$30,000 in cash from Walker. Helton and Marchione each testified that they did not know the other was involved in any theft or conspiracy (Tr. 145; 334).

POINT ONE: THE GOVERNMENT'S KNOWING
SUPPRESSION OF EXCULPATORY EVIDENCE,
AFTER DEMAND, DEPRIVED WALKER OF A
FAIR TRIAL.

It became apparent at the outset of the trial that the government could not prove that the twelve parcels Helton said she put in the sack contained money - much less that there was \$800,000 contained therein as charged in the indictment. Thus, the Court ordered the prosecutor to refrain from mentioning to the jury any specific sum of money (Tr. 22). It was thus the government's theory that it would seek to establish that there was a substantial sum of money in the parcels by showing that after September 22, 1975 (the alleged date of theft), Walker spent large amounts of cash.

The defense objected to the Court's allowing proof of this type on the grounds that (1) absent any proof that there was currency in the parcels, it was speculative and not probative and (2) that it forced the defense to put in proof that Walker was a man of substance and would have the capacity, without resort to stealing, to spend substantial sums of money. This issue will be discussed infra.

The Court, however, allowed the prosecutor to show that Walker made substantial cash purchases including a \$100,000 down payment on an apartment house in Queens.*

* The seller testified for the government that Walker came to the closing with a valise containing cash. The seller's attorney would not accept all that cash and requested that they go to a bank to convert the cash to a bank check.
• Walker and the others went to the Chase Manhattan Bank and Walker converted \$100,000 in cash for a bank check (Tr. 293). The bank provided Walker with its form which requires that such a large cash transaction be reported to I.R.S. (Exh. 19, id 126A)

The prosecutor then argued that it would be suspect for a \$17,000 a year postal employee to make such a large purchase, i.e., he must have stolen the money from the mails on September 22, 1975.*

One of the government's witnesses was Postal Inspector Edmund H. Mullins, who was the Walker case agent** and sat alongside the prosecutor throughout the trial. Mr. Mullins testified about his activities relative to the investigation of Walker and the theft of September 22 (10A - 26A, 27A-57A).

On cross-examination the following occurred:

"Q. Did you receive any information from any of the banks that Mr. Walker did business with?

"A. Yes, I did.

"MR. ROSEN (defense counsel): May I have that, please, Mr. Scotti?

"MR. SCOTTI: Do you want the information?

"MR. ROSEN: I want whatever you've got, yes."
(Tr.398) (34A)

The prosecutor did not turn over to the defense the bank/I.R.S. form reporting the \$100,000 cash transaction to I.R.S., Exhibit 19 (for identification).

* "Where did he get the money, ladies and gentlemen?"
(Prosecutor's summation, Tr. p. 532)

** Mullins testified on direct examination that the "case agent is the postal inspector to whom the investigation is assigned, the person responsible for coordinating the entire investigation" (10A).

For the sake of continuity we will set forth, in sequence, the following events which led to the discovery of Exhibit 19(id).

During the jury's two day deliberation the prosecutor informed defense counsel that Inspector Mullins' grand jury testimony was not turned over to the defense (58A).* Upon reading the material it was discovered, among other things, that Inspector Mullins had testified before the grand jury concerning his investigation of Walker's \$100,000 cash purchase of the apartment house. The defense moved for a mistrial based on the nondisclosure, but the motion was denied (106A). Instead, outside the presence of the still deliberating jury, the Court directed defense counsel to "cross-examine" Inspector Mullins as if he were still on the stand and with defense counsel now in possession of the Inspector's grand jury testimony (69A).

Inspector Mullins was confronted with the following grand jury testimony:

"Q. [by Mr. Scotti] Now, was there any record that you discovered during the course of your investigation which would indicate the amount of cash which David Walker brought to the bank?

"A. [by Inspector Mullins] Yes, there was an IRS form filled out by David Walker indicating the amount of cash." (Defendant's Exhibit AA (id); 121A-122A)

*. The nondisclosure of this 3500 material is the subject of a separate point discussed infra in Point Two.

The following then occurred during the "cross-examination" of Inspector Mullins before Judge Weinstein:

"Q. [by Mr. Rosen] Did you ever see that [IRS] form?

"A. [by Inspector Mullins] Yes.

"MR. ROSEN: I would have certainly gone into that, your Honor, and argued most strenuously.

"THE COURT: Yes, you would have. [Addressing the prosecutor:] Where is that IRS form? Why wasn't it turned over as Brady material?"
(89A)

The prosecutor immediately produced the form from his files and it was marked Exhibit 19, for identification. The form (89A - 90A) contained Walker's correct name and address and social security number except for a questionable last digit. The prosecutor argued that the form was not Brady material because of the alleged erroneous last digit in the social security number. Judge Weinstein rejected that argument stating:

"No, it does not take it out of Brady. It should have been turned over." (Tr. 678)

The Court's unequivocal finding that the document was Brady material is revealed in the following exchange

(97A):

"MR. SCOTTI: I don't see how it's [the] Brady. I don't see how it exculpates this defendant.

"THE COURT: I believe it does."

Nor can there be any question that the prosecutor was aware of the fact that he had the form in his file at trial:

"THE COURT: How come you didn't use it?
(the form)

"MR. SCOTTI: Pardon me?

"THE COURT: Why didn't you use it?

"MR. SCOTTI: Why didn't I use what?

"THE COURT: This evidence.

"MR. SCOTTI: Well, your Honor, some things I was hoping to save for cross-examination." *(94A)

It is respectfully submitted that the IRS form was exculpatory, was known by the prosecutor to be in his file at trial and was knowingly not disclosed after defense counsel had made a demand for any information from any of the banks that Walker dealt with (34A).

The United States Supreme Court in United States v. Agurs, ____ U.S. ____, 96 S.Ct. 2392, 49 L.Ed. 2d 342 (1976) sets forth various tests to be employed in determining whether there has been a denial of a fair trial where a prosecutor fails to turn over Brady material.

The Court held that:

"Because we are dealing with an inevitably imprecise standard, and because the significance of an item of evidence can seldom be predicted accurately until the entire record is complete, the prudent prosecutor will resolve doubtful questions in favor of disclosure. But to reiterate a critical point, the prosecutor will not have violated his constitutional duty of disclosure unless his omission is of sufficient significance to result in the denial of the defendant's

* If defense counsel is held to be bound by what is commonly referred to as "defense strategy" why should the prosecutor not be similarly bound by his "tactics"?

right to trial. 49 L.Ed.2d at 352

* * *

On the one hand, the fact that such evidence was available to the prosecutor and not submitted to the defense places it in a different category than if it had simply been discovered from a neutral source after trial. For that reason the defendant should not have to satisfy the severe burden of demonstrating that newly discovered evidence probably would have resulted in acquittal. 41 L.Ed.2d at 354.

* * *

... we conclude that there is no significant difference between cases in which there has been merely a general request for exculpatory matter and cases, like the one we must now decide, in which there has been no request [for Brady material] at all. 49 L.Ed.2d at 351-352.

* * *

It necessarily follows that if the omitted evidence creates a reasonable doubt that did not otherwise exist, constitutional error has been committed....if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 49 L.Ed.2d at 355.

Furthermore, this Court has stated:

"If the prosecutor has intentionally suppressed evidence whose high value to the defense could not have escaped his attention, a new trial is warranted if the evidence is merely material or favorable to the defense. E.G. United States v. Kahn, 472 F.2d 272, 287 (2nd Cir.); cert. denied, 411 U.S. 892 (1972); United States v. Keogh, 391 F.2d 138, 146-147 (2nd Cir. 1968). If, on the other hand, the government's failure to disclose is merely inadvertent or negligent, a new trial is required only if there is a 'significant chance that this added item, developed by skilled counsel as it would have been, could have induced a reasonable doubt in the minds of enough jurors to avoid a conviction.' United States v. Rosner, 516 F.2d 269, 273 (2nd Cir. 1975); United States

v. Scijo, 514 F.2d 1357, 1364 (2nd Cir. 1975);
Grant v. Alldredge, 498 F.2d 376, 380 (2nd
Cir. 1974); United States v. Miller, 411 F.2d
825, 832 (2nd Cir. 1969)." United States v.
Morell, 524 F.2d 550, 553 (2nd Cir. 1975).

We are faced with a situation wherein the prosecutor knowingly failed to disclose material in his possession which was unquestionably favorable to the defense. Utilizing the teachings of Agurs and Morell, supra, the conclusion is inescapable that constitutional error was committed which warrants a new trial.

The value of the defense of presenting the IRS form to the jury must be noted here.* While the defense portrayed Walker's actions in the post-September 22 period as being open rather than surreptitious, it would have been strenuously urged that his reporting of the \$100,000 cash transaction to IRS displayed such a total lack of consciousness of guilt that the government's hypothesis that the cash had been stolen from the mails would have been seriously undermined.

Had defense counsel been able to argue this to the jury, we submit that this Court could clearly find that a different verdict would have been reached in that a reasonable doubt would have been created. United States v. Miller, 411 F.2d 825 (2nd Cir. 1969).

* Despite the Court's expressed findings before the verdict that the form should have been turned over (94A) and that it was exculpatory (97A), immediately after the verdict was returned, Judge Weinstein, uncharacteristically did a complete turn around and held that the Brady argument "was without any substance at all." (106A)

Defense counsel reiterated this argument in the post-trial motion to set aside the verdict. Furthermore the statements of eleven jurors were presented to the trial court (148A-158A).^{*} These statements revealed that had the IRS form been made known to them, even the stricter test of Agurs would have been met in that the evidence would have been of such substance as to create a "reasonable doubt" as to the appellant's guilt. 49 L.Ed.2d, supra, at 354-355. It is to be noted again, however, that under the authority of this Circuit, "a new trial is warranted if the evidence is merely material or favorable to the defense," (Morell, supra) if the prosecutor was aware of such highly probative material.

The jurors' statements indicated that had they known of the form, (a) it would have made a difference in the deliberations and verdict of six jurors; (b) it might have made a difference in the deliberations and verdict of four jurors; and (c) it could have made a difference in the deliberations and verdict of one juror (148A-158A). In Agurs, the Court held that:

"If there is no reasonable doubt about guilt whether or not the additional evidence is considered, there is no justification for a new trial. On the other hand, if the verdict is already of questionable validity, additional evidence of relatively minor importance might be sufficient to create a reasonable doubt." 49 L.Ed.2d at 355.

^{*}In order to insure openness an application had been made to Judge Weinstein to examine the jurors

In the instant case, the entire testimony took three trial days while the jury deliberated two days.* Clearly the jury was not overwhelmingly convinced of the appellant's guilt. We submit that had the defense been able to present the IRS form to the jury whether the Court applies the "reasonable doubt" standard of Agurs or the "material and favorable" standard of Morell, the result would have been different.

As stated above, the statements of eleven jurors were presented to Judge Weinstein who rejected them under the theory of Rule 606(b) of the Federal Rules of Evidence:

"(b) Inquiry into validity of verdict or indictment. Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith, except that a juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes." (Emphasis supplied.)

We submit, however, that consideration of these statements by the jurors is in no way violative of Rule 606(b). The rule is directed toward preventing an invasion into the

*In Agurs the jury was out about 25 minutes.

jury room to ascertain on what basis a defendant is convicted or what may have led a jury to convict. As the rule states, a juror may not testify as to his "mental process" in arriving at a verdict. There is nothing in this case to suggest that this is what the appellant is trying to do. What in fact was shown was that the failure of the government to provide the form to the defense did result in a denial of due process and that the appellant, in all likelihood, would not have been convicted had this information been imparted to the jury.

"The purpose of the duty is not simply to correct an imbalance of advantage, whereby the prosecution may surprise the defense at trial with new evidence, rather, it is also to make the trial a search for truth informed by all relevant material, much of which, because of the imbalances in investigative resources, will be exclusively in the hands of the government." United States v. Bryant, 439 F.2d 642, 648 (D.C. Cir. 1971).

The failure to disgorge the IRS form was constitutional error which denied appellant a fair trial.

POINT TWO: THE GOVERNMENT'S FAILURE
TO TURN OVER INSPECTOR MULLINS' GRAND
JURY TESTIMONY WAS GROUNDS FOR A
DISMISSAL.

On the morning of the second day of jury deliberation the prosecutor delivered to defense counsel for the first time a copy of Agent Mullins' grand jury testimony (Defendant's Exhibit AA, id., 107A). Mullins, the case agent, had been called as a government witness. We submit that the prosecutor's failure to properly turn over such testimony and the trial court's refusal to grant a mistrial constitutes reversible error. The Court sternly rebuked the prosecutor, stating that such procedure was to gain "tactical advantage" and evidenced "sharp practice by the Government." (62A)

Instead of granting the mistrial, the court directed counsel to cross-examine Agent Mullins outside of the presence of the jury to see of what use the 3500 material could have been. Had counsel been able to employ this material before the jury, the following would have been shown:

A. At 117A-118A of Mullins' grand jury testimony, he testified that the parcels came to rest in the registry room at "4:30 in the morning of September 22, 1975." Without question, the defense would have brought before the jury the fact that the exact arrival time of the parcels was ascertained to be 4:30 a.m.

Records of the post office revealed that Walker had gone to lunch between 4:00-4:30 a.m. on September 22, 1975; Helton and Marchione between 4:32-5:02 a.m.

Marchione testified that Walker came up to the swingroom "between 4:00 and 5:00 in the morning" apparently to elicit Marchione's aid in committing the theft (Tr. 313). Helton testified (Tr. 134) "Dave came over to [me] in the morning, after lunch and asked me if I had heart, this was some time after 5 o'clock." (Emphasis added.)

Had the defense been apprised of the fact that Inspector Mullins had ascertained the exact time the parcels arrived in the registry room, the defense would have argued to the jury: (1) the parcels came in at the time Walker was returning from lunch and Marchione and Helton were leaving for lunch; (2) Walker could not have known that Helton would have been able to make up her bag until after she returned from lunch at 5:02, thus it would be improbable that Walker went up to see Marchione in the swingroom while Marchione was on his lunch hour between 4:32-5:02. In other words, until he knew that Helton "had heart," he wouldn't enlist Marchione's aid; (3) additionally, the defense would have argued to the jury that since the parcels did not arrive until 4:30 it would have been impossible for the crime to have been committed as Marchione testified. He said Walker went up to the swingroom between 4-5. Since Marchione was in the swingroom on his lunch break (4:32-5:02) the documentation shows that Walker could not have been upstairs during that period of time.

The record reveals that when employees go to lunch they punch in and out. Marchione testified that when

anybody on the first floor goes upstairs to the swingroom, they have to punch out (Tr. 459). The records of time worked show clearly that Walker did not punch out after he returned from lunch at 4:30. In other words, if the parcels came in at 4:30 (the exact time Walker returned from lunch) and if he in that instant discovered their arrival, he would have had to punch out to go upstairs to the swingroom to enlist Marchione's aid.

Thus, the defense would have projected these arguments to the jury in an attempt to strike directly at the witness' story of how the crime occurred. We submit that those arguments are sufficient to raise a reasonable doubt as to defendant's guilt.

B. At 116A of Inspector Mullins' testimony before the grand jury the following occurred:

"Q. [by Mr. Scotti] Were these registered parcels?

"A. [by Inspector Mullins] These were insured parcels coming into the United States. The procedure at Kennedy Airport is that insured parcels from Italy are entered to the registry section." (Emphasis added.) See, also, 115A of grand jury testimony of Inspector Mullins of August 17, 1976.

After the grand jury testimony had been furnished to the defense and the Court directed cross-examination of Inspector Mullins it was established that in fact we were not dealing with registered parcels at all, but with insured parcels. It then became known that a Mrs. Samuels was the postal employee

specifically assigned to open insured mail bags (71A).

"Q. [by Mr. Rosen] Let me ask you this, again, Inspector. Isn't it a fact that the person in Kennedy Airport, building 179 who handles insured parcels of high value...makes up his own mail sack as opposed to somebody in the registry room like Helen Helton?

"A. [by Inspector Mullins] It can be done if it's recognized as high value. Sometimes they do not make these dispatches."
(73A)

Although Inspector Mullins insisted that insured parcels of high value from Italy are treated like registered mail - a fact which we would have contested - the record reveals that: (1) the trial concerned the handling of registered mail (Tr. 120, 138, 178, 192, 202, 515, 541, 579); (2) Helton testified that she would obtain insured parcels "at a certain time of day" (Tr. 116); (3) Postal employees Horowitz and Campbell were the only people who determine valuables (Tr. 541).

Thus, had Inspector Mullins' grand jury testimony been furnished to the defense during the trial, instead of after the trial, the defense would have called Mrs. Samuels to contradict the government's argument and witnesses in their position that registered and insured mail from Italy are handled in the same way and the defense would have argued to the jury:

(1) Helton did not make up the parcels allegedly stolen;

(2) These insured parcels allegedly from banks

would have gone to Mrs. Samuels, not employees Horowitz or Campbell;

(3) Insured parcels determined to be of high value would have been dispatched by Mrs. Samuels out of the vault area directly to a convoy and not passed on to Helton; and thus

(4) Helton's testimony was false and should have been known to be such by the government.

We respectfully submit that the above arguments would have been vital to the defense to have impeached Helton's testimony and to have argued that the crime charged could not have happened. The failure to disclose that information which was contained in Mullins' grand jury testimony deprived Walker of a fair trial.

It also bears repeating that had Mullins' grand jury testimony been turned over after his direct examination, the defense would then have learned of the existence of the IRS form.

The Court found that the failure to turn over the testimony was not inadvertent.*

* "MR. SCOTT: For the record, there is no question about the fact that I should have given Mr. Rosen the Grand Jury testimony of Mr. Mullins. There is no question about that. I was wrong....I do take exception to your Honor's characterization of it as a tactic. It was not done intentionally. It was not done willfully. It was not done with any intent to gain any kind of advantage. It was completely inadvertent because of the circumstances of what was going on at the time.

• "THE COURT: I don't agree." (100A - 101A)

Upon motion for a new trial at the time of sentencing, the court found that the post-summation cross-examination of Agent Mullins revealed nothing helpful to the defense primarily because the appellant was an "extremely experienced supervisory employee" (l37A) thus reasoning that Walker knew what Mullins had unearthed in his investigation. There is nothing in the record to support this conclusion. Walker, it must be noted, on the morning in question, was not assigned to his normal post, but had replaced the supervisor in the Registry Section, who was absent on annual leave (Tr. 361).

A new trial should have been granted to permit defense counsel to cross-examine Agent Mullins as to his grand jury testimony and to allow Mrs. Samuels to be called to show that insured mail could not have been removed the way the government suggested.

In effect, the trial court withheld the 3500 material by denying defense counsel the opportunity to employ it before a jury. The trial court may not withhold 3500 material by determining that statements contained therein are consistent with a witness' testimony. Whether such statements tend to impeach a government witness is within the province of the defense to decide. Banks v. United States, 348 F.2d 231 (8th Cir. 1965); United States v. McCarthy, 292 F.Supp. 937 (S.D.N.Y. 1968). The law in this Circuit is clearly inopposite of what Judge Weinstein determined at the time of trial.

.

"The 1970 amendment to the Jencks Act, 18 U.S.C. §3500(e)(3), which codified this Court's holding in United States v. Youngblood, 379 F.2d 365 (2nd Cir. 1965), entitles a defendant to the grand jury testimony of a government trial witness without any preliminary inspection for usefulness by the trial judge." United States v. Ramirez, 482 F.2d 807, 813 (2nd Cir. 1973), cert. den. 414 U.S. 1070.

By requiring trial counsel to demonstrate what he might have done with the 3500 material before a jury, not only was the trial court imposing its own mind into what a jury might have found, but also, by not permitting such information to go before the jury, severely limited the appellant's right to confrontation as guaranteed by the Sixth Amendment.

"It is the essence of a fair trial that reasonable latitude be given the cross-examiner even though he is unable to state to the court what facts a reasonable cross-examination might develop. Prejudice ensues from a denial of the opportunity to place the witness in his proper setting and put the weight of his testimony and his credibility to a test, without which the jury cannot fairly appraise them... [citations] to say that prejudice can be established only by showing that the cross-examination, if pursued, would necessarily have brought out facts tending to discredit the testimony in chief, is to deny a substantial right and withdraw one of the safeguards essential to a fair trial. [citations]" Alford v. United States, 282 U.S. 687, 692, 51 S.Ct. 218, 75 L.Ed. 624 (1931), see also Smith v. Illinois, 390 U.S. 129, 88 S.Ct. 748, 19 L.Ed. 2d 956 (1968).

POINT THREE: THE COURT ERRED IN
ALLOWING THE GOVERNMENT TO PROVE
WALKER'S EXPENDITURES SUBSEQUENT
TO SEPTEMBER 22.

Nowhere in the record was there any proof as to what was contained in the 12 packages allegedly stolen. Despite this fact, four witnesses were called by the government to testify as to expenditures made by Walker after the date of the alleged theft.

Prior to the commencement of testimony, counsel for the appellant had moved to exclude such testimony (Tr. 15-17) alleging that it was highly prejudicial and shifted the burden of proof to the appellant. However, the court ruled that:

"If a man of relatively modest background, the jurors will assume, works in the post office, will not have a lot of money of money and he shows an awful lot of money and change of lifestyle immediately after a huge theft, it's extremely relevant."
(Tr. 16-17)

Thus Rubin Kershaw testified that in January, 1976, Walker purchased an apartment complex from Kershaw's company for \$500,000. At the time of the closing, Walker made the down payment with the sum of \$100,020.49 in cash (Tr. 291). Bruce Zancope, an automobile salesman, testified that in February of 1976 Helton purchased a Ford Thunderbird automobile. The appellant partially paid for this automobile with \$5,032 in cash. Thereafter Noel Koepfel was permitted to testify that in January or February of 1976 Walker purchased a Jaguar automobile from his firm for \$15,000 in cash. Helton was

permitted to testify that Walker purchased a mink coat and mink jacket for \$5,200 as well as paying her way to Las Vegas (Tr. 151-152).

All of this merely tended to show that during the months after September 22, 1975, Walker spent large amounts of money. Based on this, the prosecutor was permitted to argue that these funds must have come from the theft from the mails on September 22.

"...under two situations only can money be admitted: first, when there is proof of an unlawful taking completed with convincing identification of the property stolen; second, when a defendant impecunious prior to robbery has unexplained possession of large amounts of money after the robbery." United States v. Marx, 485 F.2d 1178, 1183 (10th Cir. 1973)

"Sudden possession of considerable sums of money has long been recognized as relevant to a charge of theft, id. [Wigmore] §154." United States v. Ravich, 421 F.2d 1196 (2nd Cir. 1970).

Appellant does not take issue with the principals enunciated in Marx and Ravich, supra. However, here there is absolutely no proof whatsoever that Walker was impoverished prior to September 22, 1975, nor that he could not have afforded to make the expenditures testified to.* In Ravich, supra, the

* On the contrary, because of the admission of expenditure evidence, the defense was forced to establish that Walker was a man of considerable assets, but short of putting Walker on the stand, could not show that those assets accounted for the expenditures.

property stolen was known to the government and was independently demonstrated. See: Smith v. United States, 157 F.2d 705 (D.C. Cir. 1946). Here no one knew what was in the allegedly stolen sack.

In theft cases where proof of possession of money or spending of money is offered there must be independent proof of a sudden increase in wealth contradictory to the prior fiscal condition of the defendant. In the instant case these factors were not present. The trial court thus shifted the burden of proof to the appellant to account for the expenditures. It is axiomatic that the burden of proof in a criminal case to prove guilt beyond a reasonable doubt never shifts and remains upon the prosecutor throughout the trial. Leland v. Oregon, 343 U.S. 790, 78 S.Ct. 1002, 96 L.Ed. 1302 (1957); rehearing den. 344 U.S. 848. In the instant case, the trial court erred in admitting the proof of expenditures and shifting the burden of proof.

POINT FOUR: THE TESTIMONY OF ANTHONY
SHORT WAS IMPROPERLY ADMITTED AND
UNDULY PREJUDICIAL.

Over objection Anthony Short, a postal employee, testified to a recorded conversation with Walker on September 3, 1975. The conversation was offered by the government to show that Walker, approximately three weeks before the alleged theft here, had solicited Short's aid in stealing mail.

The trial court ruled that the testimony was relevant under Rule 401 of the Federal Rules of Evidence. It is submitted that such testimony ran afoul of Rule 404(b) F.R.E. in that its thrust and purpose was to prove the character of Walker in order to show that he acted in conformity therewith.

Short was not involved in this indictment in any way. He was not alleged to have participated in or have knowledge of the alleged theft of September 22. The probative value of his testimony was outweighed by the prejudice which was projected to the jury. The new statutory rule in this area [Rule 404(b)] is merely a codification of prior existing case law. See: Spencer v. Texas, 385 U.S. 554, 87 S.Ct. 648, 17 L.Ed.2d 606 (1967) and Michelson v. United States, 335 U.S. 469, 69 S.Ct. 213, 93 L.Ed. 168 (1949).

There was no purpose in introducing evidence of other alleged crimes or wrongful acts in the instant trial other than to show that Walker had propensity toward such activity. The conversation between Walker and Short was totally unrelated to the instant indictment.

The rule in the Second Circuit in this area has been stated to be that

"...[S]uch evidence is admissible only if it is substantially relevant to some other purpose other than to prove criminal character. United States v. Bozza, 365 F.2d 206, 213 (2nd Cir. 1966); United States v. Keilly, 445 F.2d 1285, 1288 (2nd Cir. 1971), cert. den. 406 U.S. 962, 92 S.Ct. 2064, 32 L.Ed.2d 350 (1972)."
United States v. Vario, 484 F.2d 1052, 1056 (2nd Cir. 1973), cert. den. 414 U.S. 1129. (1974).

It is herewith submitted that the government could not bring evidence of other alleged crimes and wrongful acts within the ambit and intent of Rule 404 and its specific exceptions. In United States v. Byrd, 352 F.2d 570 (2nd Cir. 1965), the Court stated:

"There was therefore no pressing necessity that evidence of that prior action [and other alleged criminal activity] be offered on the Government's main case. United States v. Ross, 321 F.2d 61, 67 (2nd Cir. 1963)... For the present purpose of this discussion, it is enough to point out that the scope of discretion does not include every offer of a prior similar offense which may contribute something to a showing of the Government's main case. Where the prejudice is substantial and probative value through the nature of the evidence or the lack of any real necessity for it is slight, its admission at that stage may be held to be an abuse of discretion. Under such circumstances, the better practice would be to sustain the objection to the offer on the Government's main case without prejudice to its re-offer in rebuttal, if then warranted." United States v. Byrd, supra, at page 575.

Assuming, arguendo, that the government might be able to fit such testimony within one of the exceptions under Rule 404, this standing alone still does not solve the situation to the satisfaction of the Appeals Courts.

"Even in cases in which the evidence is offered to prove one of the enumerated exceptions to the general rule, its probative value may be very slight while its prejudicial character may be very strong. Under such circumstances the trial judge has the duty in the exercise of his discretion, to exclude it." United States v. Kohl, 379 F.2d 427, 438 (2nd Cir. 1967). See also United States v. Fierston, 419 F.2d 1020, 1023 (7th Cir. 1969). (Emphasis added.)

A situation strikingly similar to the instant case is found in United States v. Bussey, 432 F.2d 1330 (D.C. 1970). In Bussey, the defendant was tried and convicted for theft from the Edison Sewing Machine Company at 4:20 p.m. on February 23, 1968. At trial the government offered evidence of a theft occurring at the General Transmission Company at 4:00 p.m. on the same date. The trial court permitted this testimony to be admitted into evidence. In reversing the conviction of the defendant the Court of Appeals stated:

"The testimony of the General Transmission witnesses did not evince a particular pattern of the two robberies which would mark them as distinctly the 'handiwork' of the same men. The facts common to the two robberies do not distinguish them from any number which have come before this Court recently, and for which persons have been convicted. The conduct of the robbers was certainly not 'so unusual and distinctive to be like a signature.' Nor was this evidence probative of 'identity' as that concept is traditionally employed. The fact that the witnesses identified appellant as a participant in the General Transmission holdup fell short of showing 'former conduct of his, known to be the conduct of the perpetrator' of the Edison robbery...The admission of this evidence was error; its probative value on the relevant point was insufficient to outweigh its inflammatory

effect on the jury. While the other evidence of the appellant's guilt is strong, it cannot be said 'that the error did not influence the jury.' The jurors might have substantially disbelieved the Edison witnesses and still have returned their guilty verdict on the basis of General Transmission witnesses' testimony. Consequently, we conclude that allowing this testimony into evidence was prejudicial error." (footnotes omitted) United States v. Bussey, supra, at pages 133-134.

As is evident, the situations in Bussey and in the instant case are analagous. The authorities cited herein warranted the exclusion of any evidence which would tend to implicate the appellant in crimes or wrongful acts other than those alleged in the indictment, especially where, as here, the conversation introduced was subject to various interpretations and had no connection with the facts as testified to at the trial.

CONCLUSION

For the reasons set forth herein the judgment of conviction should be reversed.

Respectfully submitted,

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